

KENNETH H. YOON (State Bar No. 198443)
STEPHANIE E. YASUDA (State Bar No. 265480)

YOON LAW, APC
One Wilshire Blvd., Suite 2200
Los Angeles, California 90017
Telephone: (213) 612-0988
Facsimile: (213) 947-1211

JOSEPH M. HEKMAT (State Bar No. 265229)

HEKMAT LAW GROUP
11111 Santa Monica Blvd., Suite 1700
Los Angeles, California 90025
Telephone: (424) 888-0848
Facsimile: (424) 270-0242

Class Counsel and
Attorneys for Plaintiff Aristedes Francisco

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ARISTEDES FRANCISCO, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

v.

EMERITUS CORPORATION, an
unknown corporation; BROOKDALE
SENIOR LIVING COMMUNITIES,
INC., an unknown corporation, and
DOES 1 through 50, inclusive.

Defendants.

Case No.: CV 17-02871 VAP (SSx)

[Hon. Virginia A. Phillips, Courtroom
8A]

**PLAINTIFF'S MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: September 23, 2019

Time: 2:00 p.m.

Place: Courtroom 8A

Date Filed: March 16, 2017

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 23, 2019, at 2:00 p.m., or as soon thereafter as this matter may be heard in Courtroom 8A of the above-captioned Court, located at 350 West 1st Street, Los Angeles, CA 90012, Plaintiff Aristedes Francisco (“Plaintiff”) will, and hereby does, bring an unopposed motion for an order: (1) granting final approval of the class action settlement reached by the Parties in this action, (2) fully and finally approving and directing distribution to the Class of the net settlement amount pursuant to the terms of the settlement, (3) fully and finally approving the Enhancement Payment to Plaintiff in the amount of \$10,000.00, (4) fully and finally approving the award of attorneys’ fees in the amount of \$83,333.33, (5) fully and finally approving an award of costs in the amount of \$15,000.00, and (6) fully and finally approving the Settlement Administration Costs in the amount of \$21,552.00.

This motion will be based on this notice, the supporting memorandum of points and authorities, the declarations filed concurrently herewith, all pleadings and papers currently in the Court’s file and such other oral and documentary evidence as may be presented at the hearing on this motion.

DATED: July 1, 2019

YOON LAW, APC
HEKMAT LAW GROUP

By: /s/ Kenneth H. Yoon
Kenneth H. Yoon
Stephanie E. Yasuda
Joseph M. Hekmat
Class Counsel and Attorneys for Plaintiff
Aristedes Francisco

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this Motion, Plaintiff Aristedes Francisco (“Plaintiff” or “Class Representative”) seeks the Court’s final approval of the Joint Stipulation of Settlement and Release (“Settlement”) between Plaintiff and Defendants Emeritus Corporation and Brookdale Senior Living Communities, Inc. (“Defendants”). The Settlement provides for \$250,000 as the Maximum Settlement Amount with no reversion to the Defendants. The Net Settlement Amount is the balance of the Gross Settlement Amount after the following are deducted: (1) attorneys’ fees in an amount up to \$83,333.25 (33 1/3% of the Gross Settlement Amount); (2) actual litigation costs advanced by Class Counsel not to exceed \$15,000; (3) Settlement Administration Costs up to \$22,000.00; and (4) \$10,000.00 for the Enhancement Payment to Plaintiff. The Class consists of all current and former non-exempt employees of Defendants who worked for Emeritus Corporation in California at any time from May 11, 2013 to the present, excluding those who transitioned to any Brookdale entity (Brookdale acquired Emeritus in 2014). The Class totals 2,292 persons. The Class Period is the period from May 11, 2013 through July 31, 2014.

Pursuant to the Court’s order of April 30, 2019 granting preliminary approval, the Settlement Administrator, ILYM Group, Inc., has complied with this Court’s requirements for notice to the Class by mailing notice to 2,292 Class Members contained in the class list. The results of the notice process are as follows:

1. Four (4) exclusion requests;
2. Zero (0) objections;
3. Ninety-Eight (98) undelivered notices.

Thus, virtually every Class Member (99.83%) will be sent a settlement payment. (Declaration of Stephanie Molina (“Molina Decl.”) (DE 92) ¶¶ 7-13.)

Plaintiff and Class Counsel respectfully request that the Court grant final approval of the Settlement, including payments from the gross settlement amount for

1 the Class Representative's Enhancement Payment of \$10,000.00, attorneys' fees in
2 the amount of \$83,333.33, costs in the amount of \$15,000.00, and settlement
3 administration costs to ILYM Group, Inc. in the amount of \$21,552.00, which is less
4 than the \$22,000.00 amount contained in the class notice. (Molina Decl. Ex. A, p. 4.)

5 **II. NOTICE TO THE CLASS**

6 Pursuant to the Court's Procedural Order granting preliminary approval of the
7 class action settlement (DE 90), the Settlement Administrator gave notice via USPS
8 First-Class Mail to the 2,292 Class Members contained in the class list on May 24,
9 2019. (Molina Decl. ¶ 7.) As part of the preparation for mailing, the Settlement
10 Administrator processed all 2,292 names and addresses contained in the Class List
11 against the National Change of Address ("NCOA") database maintained by the
12 United States Postal Service, for purposes of updating and confirming the mailing
13 addresses. (Molina Decl. ¶ 6.)

14 352 Notice Packets were returned to the Settlement Administrator as
15 undeliverable, none bearing a forwarding address. The Settlement Administrator
16 performed a computerized skip trace on all 352 returned Notice Packets in an effort
17 to obtain an updated address for purposes of re-mailing the Notice Packet. As a result
18 of this skip trace, the Settlement Administrator obtained 254 updated addresses and
19 promptly re-mailed the Notice Packet to those Class Members via U.S. First Class
20 Mail. (Molina Decl. ¶ 8.)

21 As of the date of this motion, a total of 254 Notice Packets have been re-
22 mailed, and a total of 98 Notice Packets (4.3%) have been deemed undeliverable, as
23 no updated address was found notwithstanding Settlement Administrator's skip
24 tracing efforts. (Molina Decl. ¶ 10.) There were four requests for exclusion and no
25 objections. (Molina Decl. ¶¶ 11, 12.)

26 The Settlement Administrator has been and will continue to perform the
27 required duties to ensure the best practicable notice, as set forth in the Settlement and
28 the Court's order.

III. EVALUATION OF THE SETTLEMENT

To determine the preliminary fairness of an agreement, the Court balances the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

The Court's Procedural Order (DE 90) addressed the *Linney* factors and concluded that the Settlement was fair, reasonable, and adequate. As set forth in Plaintiff's motion for preliminary approval (DE 88) and the declaration of the Settlement Administrator (DE 92), Plaintiff has provided the Court with the "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). This includes the gross settlement amount, the average net recovery to each Class Member, and an estimate of actual damages.

To briefly reiterate the points made in Plaintiff's motion for preliminary approval, the Settlement in the amount of \$250,000.00 represents a fair, reasonable, and adequate result in this action. The parties actively litigated this case since the commencement of the lawsuit in March 2017. Counsel for the parties used the pre-mediation time period to investigate the veracity, strength, and scope of the class claims, and also to prepare the matter for class certification. The parties conducted formal and informal investigations and discovery into the facts of the case (including motion practice as needed), which included, and were not limited to: obtaining contact information for putative class members; contacting and interviewing Plaintiff and other putative class members; conducting depositions; propounding written discovery requests; and reviewing and analyzing voluminous documents and data

1 produced by Defendants, including with the assistance of an expert. These documents
2 and data included, and were not limited to, employment records for Plaintiff and
3 other putative class members, a large sampling of payroll data for putative class
4 members, and Defendants' operations and employment policies, practices, and
5 procedures. Class Counsel have extensive experience in employment class action
6 law, including significant experience in wage-and-hour class action litigation. Class
7 counsel have been appointed class counsel in numerous employment class action
8 cases, and have recovered millions of dollars for individuals in California. Both
9 Parties' counsel were capable of assessing the strengths and weaknesses of the Class
10 Members' claims against Defendants and the benefits of the Settlement under the
11 circumstances of the case and in the context of a private, consensual settlement
12 agreement. Further, the Settlement takes into account the potential risks and rewards
13 inherent in any case and, in particular, with this case. This action has not proceeded
14 through class certification, and both Parties faced the risk of the Court's certification
15 decision. Following class certification, preparation for trial would have been
16 expensive for all parties, and trial outcomes are inherently uncertain.

17 In addition to this information Plaintiff supplied in support of his motion for
18 preliminary approval, Plaintiff notes Class Members' reaction to the Settlement has
19 been overwhelmingly positive, as detailed in the declaration of the Settlement
20 Administrator filed on July 22, 2019 (DE 92). Specifically, of a Class of 2,292
21 persons, there have been zero objections and four opt-outs, for a total participation
22 rate of 99.83%. (Molina Decl. (DE 92) ¶¶ 7-13.) Thus, 2,288 Qualified Claimants
23 will share in the net amount of \$120,114.67. Along with the other *Linney* factors
24 previously considered by the Court, this factor also weighs in favor of final approval.

25 **IV. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE**
26 **REASONABLE**

27 As detailed in Plaintiff's motion for attorneys' fees and costs filed on July 1,
28 2019 (DE 91), Plaintiff is requesting attorneys' fees in the amount of \$83,333.33,
which represents a thirty-three and one-third percent of the Gross Settlement Amount

1 of \$250,000.00. Plaintiff is also requesting an award of litigation costs in amount of
2 \$15,000.00, which is less than the actual costs of \$15,176.14. Defendants do not
3 oppose these requests, and there have been no objections from the Class to these
4 amounts.

5 In a diversity action such as this, federal courts apply state law both to
6 determine the right to fees and the method for calculating them. *Vizcaino v. Microsoft*
7 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit has held that it will
8 “follow other circuits that apply state law in calculating the fee.” *Mangold v. Cal.*
9 *Public Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995). California law, in turn,
10 embraces the percentage method, which “calculates the fee as a percentage share of a
11 recovered common fund or the monetary value of the plaintiffs’ recovery.” *Laffitte v.*
12 *Robert Half Int’l Inc.*, 1 Cal. 5th 480, 490 (2016). Under the percentage method, “fee
13 awards in class actions average around one-third of the recovery.” *Chavez v. Netflix,*
14 *Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008).

15 Thus, Plaintiff’s request for fees in the amount of one-third of the common
16 fund is appropriate. Moreover, as detailed in Plaintiff’s fee motion (DE 91), Class
17 counsel’s total lodestar is \$468,653.42, based on 712.6 attorney hours, and thus the
18 requested fees are less than a fifth of class counsel’s total lodestar. Thus, the lodestar
19 cross-check provides support for Plaintiff’s request. *See Vizcaino*, 290 F.3d at 1050
20 (“Calculation of the lodestar, which measures the lawyers’ investment of time in the
21 litigation, provides a check on the reasonableness of the percentage award”). The
22 reasonableness of the requested fee award is confirmed by the lodestar cross-check.

23 Further, Class Counsel took a significant risk in pursuing this case, and
24 obtained an excellent result. Brookdale acquired Emeritus in 2014, and at the time
25 disseminated an arbitration agreement to its employees. Thus, the Class consists only
26 of those persons who worked for Emeritus and did not subsequently execute
27 arbitration agreements, *i.e.*, the Class is comprised of former employees of Defendant
28 Emeritus whose employment terminated over five years ago. The likelihood of

1 success at class certification – which is so often dependent upon class members’
2 willingness to participate in the action and execute declarations – is low because
3 Class Members are less likely to (1) recall events that happened over five years ago,
4 and (2) have a desire to involve themselves in an action that challenges employment
5 practices of a former employer that occurred many years ago. Further, at the time of
6 filing of this action, the time period for which Plaintiff and counsel could assert a
7 claim was a narrow one-year period, as the statute of limitations had run on any
8 claims Plaintiff may have had under California’s Labor Code. Thus, this action is
9 premised solely upon the alleged violation of California’s Unfair Competition Law
10 (“UCL”). Nevertheless, the Settlement represents almost 30% of the estimated actual
11 loss.

12 Based on the foregoing and on Plaintiff’s fee motion (DE 91), Plaintiff
13 respectfully requests the Court finally approve attorneys’ fees in the amount of
14 \$83,333.33.

15 **V. THE REQUESTED ENHANCEMENT PAYMENT IS REASONABLE**

16 As detailed in Plaintiff’s motion for attorneys’ fees and costs filed on July 1,
17 2019 (DE 91), as well as Plaintiff’s declaration (DE 91-4), Plaintiff has made
18 significant sacrifices to pursue this lawsuit. Most notably, Plaintiff has lived alone in
19 Los Angeles and deferred returning to his family in the Philippines so that he could
20 be available during the pendency of this action. He has not seen his wife and three
21 boys since approximately December 2017. This is a unique hardship that a typical
22 class representative would not ordinarily face, and one that Plaintiff took upon
23 himself for the benefit of this Class.

24 Accordingly, Plaintiff respectfully requests that the Court approve an
25 Enhancement Payment in the amount of \$10,000.00 for his work done on behalf of
26 the Class.
27
28

1 **VI. SETTLEMENT ADMINISTRATOR'S COSTS SHOULD BE**
2 **APPROVED**

3 The Settlement Administrator initially estimated \$22,000.00 for administration
4 costs, which is the amount disclosed in the Class Notice. However, the final costs are
5 less than the not-to-exceed amount, at \$21,552.00. According to the Settlement,
6 Settlement Administration Costs shall be paid from the Gross Settlement Amount.

7 The Settlement Administrator has complied with the terms of the Settlement
8 and the Court's Procedural Order. For these reasons, Plaintiff respectfully submits the
9 Court should approve the Settlement Administration Costs in the amount of
10 \$21,552.00.

11 **VII. CONCLUSION**

12 Based on the foregoing argument and authority, Plaintiff respectfully submits
13 that the standards for final approval of the Settlement have been met, and the terms of
14 the Settlement are fair, adequate and reasonable.

15 DATED: July 1, 2019

YOON LAW, APC
HEKMAT LAW GROUP

17
18 By: /s/ Kenneth H. Yoon
19 Kenneth H. Yoon
20 Stephanie E. Yasuda
21 Joseph M. Hekmat
22 *Class Counsel and Attorneys for Plaintiff*
23 *Aristedes Francisco*
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